Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JOSEPH V. TINELLI, SR.,
Petitioner,

v.

FRANK E. REDL and HANKIN, HANIG, STALL, & CAPLICKI,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a circuit court, sitting in diversity and reviewing a complex causation issue as a matter of unresolved forum state substantive law, in which there is ample evidence for a jury to reasonably find the required proximate, causal nexus between the careless act and the resulting injury, is in error when it declines to certify the question to the highest court of the state and, instead, decides the issue as a matter of law by looking exclusively to the decisions of the lower state courts and other jurisdictions, giving rise to a conflict in applicable principles for determining substantive state law with other circuit courts and this Court.

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PETITION FOR WRIT OF CERTIORARI

Joseph V. Tinelli, Sr., respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 20, 1999, in order to resolve the conflict between the Second Circuit and other United States circuit courts, and relevant decisions of this Court on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit that gives rise to this petition is reprinted in Appendix A hereto ("App. A") starting at page A-1. By order filed December 20, 1999, the Second Circuit affirmed defendants', now respondents', motion for summary judgment on plaintiff's, now appellant's, claim for legal malpractice. The opinion of the circuit court is reported. The opinion of the district court is reprinted in Appendix B hereto ("App. B") starting at B-1. The Report and Recommendation of the Magistrate Judge to the district court is reprinted in Appendix C hereto ("App C") starting at C-1.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its decision on December 20, 1999. (App. A, A-1).

Pursuant to Supreme Court Rule 14.5, this petition is filed in a timely manner.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In December 1988, Joseph V. Tinelli, Sr., a decorated World War II combat veteran, was terminated from his position as Code Enforcement Officer of the Town of Pawling, New York (the "Town"). Thereafter, Tinelli retained an attorney, Frank Redl, to represent him in connection with his termination. In January 1989, Redl informed the Town that Tinelli, as a civil servant, was entitled to an administrative hearing under N.Y. Civil Service Law § 75 for a formal determination of his employment status.[1] Following a two-day hearing, Tinelli

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[1] New York Civil Service Law § 75(1) (McKinney 1999) provides that certain civil servants "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for

as found guilty of three charges of "misconduct and incompetence" --one charge of failing to enforce the Town code requirements regarding the removal of abandoned vehicles and two charges of abusive conduct toward a colleague and a citizen. Pursuant to those findings, the hearing officer recommended termination of Tinelli's employment. On June 27, 1989, the Town Board adopted the hearing officer's findings and recommendation.

In July 1989, Redl initiated Tinelli's appeal from the administrative hearing decision by filing a notice of petition in the Supreme Court of New York, Dutchess County pursuant to N.Y.C.P.L.R. 78 (the "Article 78 appeal").[2] On October 18, 1989, the Supreme Court transferred the case to the Appellate Division, Second Department, pursuant to N.Y.C.P.L.R.7804(g). Redl took no further action, however, after the initial filing of the petition for Tinelli's appeal. In April 1990, six months after having been transferred to the Appellate Division, Tinelli's appeal expired.

Following the expiration of his 78 appeal, Tinelli commenced this malpractice suit against Redl in the United

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incompetency or misconduct shown after a hearing upon stated charges pursuant to this section."

[2] An appeal pursuant to Article 78 is a special proceeding to challenge, *inter alia*, "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." N.Y.C.P.L.R. 7803(3) (McKinney 1994).

States District Court for the Southern District of New York in April 1996. Tinelli alleged, *inter alia*, that Redl's failure to perfect the Article 78 appeal, including his failure to move for an extension of time to perfect, constituted malpractice. The case was referred to Magistrate Judge Douglas F. Eaton for pre-trial proceedings, and, after substantial discovery, Redl moved for summary judgment on all claims. On November 16, 1998, the magistrate judge issued a Report and Recommendation, recommending that Redl's motion be granted, with one exception not relevant to this appeal. With respect to Redl's failure to perfect the Article 78 appeal, the magistrate judge found that the appeal would not have been successful even if it had been perfected and thus concluded that Redl's failure to perfect the appeal did not cause any damage to Tinelli. The district court adopted the magistrate judge's Report and Recommendation in its entirety and entered judgment on February 3, 1999.[3]

Tinelli subsequently filed a timely appeal to the United States Court of Appeals for the Second Circuit, claiming, *inter alia*, that the district court erred in deciding the substantive state issue of causation as a matter of law (App. A, A-5).

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[3] Tinelli also claimed that Redl's poor performance at the administrative hearings constituted malpractice. The district court adopted the magistrate judge's recommendation that Redl's motion for summary judgment be granted as to this claim as well.

The circuit court heard arguments on October 7, 1999, and rendered its decision on December 20, 1999. The circuit court affirmed the order and judgment of the district court granting defendants' motion for summary judgment and dismissing the action. (App A, A-7). In its opinion, the circuit court, commenting on the issue of causation as a matter of law, noted that (1) "...New York substantive law applies in this diversity suit." (2) "...we cannot say that the state's law is certain on this point." (3) "...the New York Court of Appeals has not spoken on the issue..."; and (4) "This inquiry requires us to look to the decisions of the lower state courts and to consider decisions in other jurisdictions." (App. A, A-5). The circuit court declined to certify the question, but answered the question nevertheless. (*Ibid.*).

REASONS FOR GRANTING THE PETITION

"The concept of a federal general common law, lurking (to use Justice Holmes' phrase) as a 'brooding omnipresence in the sky,' was questioned for some time before being firmly rejected in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)."[4]

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[4] *Salve Regina College v. Russell*, 499 U.S. 225, 226 (1991).

I. The Decision of the Court of Appeals is Erroneous, and its Approach to Resolving a Matter of Substantive State Law is in Conflict with Other Circuits and This Court

In *Salve Regina College v. Russell*, 499 U.S. 225, 227 (1991), the Court observed:

> "In decisions after *Erie*, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: 'with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law.' *Meredith v. Winter Haven*, 320 U.S. 228, 238 (1943). *See also Ruben v. New York Life Ins. Co.*, 304 U.S. 202, 208-209 (1938)."

Erie mandates that a federal court sitting in a diversity suit apply the substantive law of the forum state concerning the question of law, absent federal statutes or constitutional provisions to the contrary.[5]

When there is uncertainty in state law in a diversity case, it is often appropriate to certify the unresolved question to the highest court of the state. [6]

In the instant case, on the complex issue of causation as a matter of law, the circuit court conceded (1) "...we

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[5] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

[6] *Liriano v. Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998); *McCarthy v. Olin Corp.*, 119 F.3d 148, 153-54 (2d Cir. 1997).

cannot say that the state's law is certain on this point."; and, (2) "...the New York Court of Appeals has not spoken on the issue..." (App. A, A-5). There was clearly no controlling state authority on the issue of causation, and the issue was unresolved. Certification of the question to the highest court of the state was appropriate.

Nevertheless, the court answered the question, without certifying the question to the highest court of the state, based upon "the narrowness of the issue presented and the unanimity of extensive precedent..." (*Ibid.*)

Analyzing the criteria for when certification of a question is not proper, the petitioner notes certification is not proper where the question does not present a complex issue and sufficient precedent exists to make a determination.[7] In addition, as the Tenth Circuit noted, although causation is generally a question of fact, "the question becomes an issue of law when there is no evidence from which a jury could reasonably find the required proximate, causal nexus between the careless act and the resulting injuries," *Henry v. Merck and Co.*, 877 F.2d 1489, 1495 (10th Cir. 1989). Similarly, the First Circuit noted that while resolving causation is generally within the jury's domain, the fact "[t]hat causation is ordinarily a fact question does not make it invariably a fact question" *(Peckham v. Continental Casualty Ins. Co.*, 895 F.2d 830, 837 (1st Cir. 1990).

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[7] *McCarthy v. Olin Corp.*, 119 F.3d 148, 153-54 (2d Cir. 1997).

However, in the instant case, the court ruled on a complex issue of causation as a matter of substantive state law, with an admitted lack of controlling precedent, and with ample available evidence from which a jury could reasonably find the required proximate, causal nexus between the careless act and the resulting injuries. The Second Circuit is in conflict with its own precedent and the articulations of the Tenth Circuit, and arguably the First Circuit, with regard to its approach to resolving the issue of causation as a matter of law or fact.

The Second Circuit noted in its decision that respondent "Redl concedes that his failure to perfect the Article 78 appeal satisfies the first two of these requirements," that is, Redl conceded having had a duty and breaching it. The only remaining element to be satisfied in the cause of action was causation. (App. A, A-4, A-5). Breach of a legal duty is a cause in fact of harm if that harm would not have occurred but for the breach (Restatement (Second) of Torts ("Restatement") § 432(1)(1965)). There was but one prominent issue, and the court failed to satisfy the well-established criteria for not certifying a question of substantive state law, and relied, in substantial part, on the narrowness of the question to affirm the lower court decision. This is not in keeping with the mandate of this Court in *Salve*,[8] as noted in the opening of this reason for granting this petition. More precisely, the reasoning of the

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[8] *Salve Regina College v. Russell*, 499 U.S. 225, 227 (1991).

circuit in this decision is in direct conflict with the articulations of this Court.

Furthermore, the circuit court failed to certify the question of substantive state law in a diversity suit in which the district court granted summary judgment. (App. A, A-4).

Summary judgment is appropriate only when there are no genuine issues of material fact, and the moving party is entitled to prevail as a matter of law.[9]

Again, the central issue of causation, as a substantive state law question, arises in the context of a factual matter, as the petitioner argued before the circuit, that should have been resolved by a jury. (App. A, A-5).

The decision of the court of appeals is clearly erroneous, and its approach to resolving a matter of substantive state law is in conflict with other circuits and this Court. The Court should grant certiorari to review this important matter.

II. The Question Presented is Important

At the circuit court level, conflicting decisions regarding the application of appellate review in matters of state substantive law are proliferating rapidly in virtually all circuits. The need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance, since there are systemic reasons for the failure of

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[9] *Marshall v. Nacht,* 569 N.Y.S.2d 113, 114 (2d Dep't 1991).

circuit courts to engage in a uniform approach to addressing issues of substantive state law when no controlling state precedent exists. Moreover, for the reasons previously stated, the decision below is erroneous, and the issue that it addresses is important. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: October 7, 1999 Decided: Dec 20 1999)

Docket No. 99-7248

JOSEPH V. TINELLI, SR.,
Plaintiff-Appellant,

v.

FRANK E. REDL and HANKIN, HANIG, STALL & CAPLICKI,
Defendants-Appellees.

Before: JACOBS, CALABRESI and SOTOMAYOR,
Circuit Judges.

On appeal from an order and judgment of the United States District Court for the Southern District of New York (Wood, J.), granting defendants' motion for summary judgment on plaintiff's claim for legal malpractice.

Affirmed.

JOHN A. ARETAKIS, Law Office of John A. Aretakis, New York, New York, *for plaintiff-appellant.*

DEBORA A. PITMAN, Conway, Farrell, Curtain & Kelly, P.C., New York, New York, *for defendants-appellees.*

PER CURIAM:

Plaintiff-appellant Joseph Tinelli appeals from an order and judgment of the United States District Court for the Southern District of New York (Wood, J.), adopting in its entirety the Report and Recommendation of the magistrate

judge (Eaton, M.J.), recommending that summary judgment be granted in favor of defendants-appellees Frank Redl and Hankin, Hanig, Stall & Caplicki.[1] We affirm the grant of summary judgment substantially for the reasons stated by the district court and magistrate judge. We write only to address Tinelli's malpractice claim as it relates to Redl's failure to perfect the appeal from an administrative hearing decision, which found Tinelli guilty of misconduct and recommended termination of his employment. The resolution of that claim turns on the issue of New York state law, i.e., ought a court or jury determine whether an attorney's failure to perfect an appeal causes damages to the plaintiff.

BACKGROUND

In December 1988, Joseph Tinelli was terminated from his position as Code Enforcement Officer of the Town of Pawling, New York (the "Town"). Thereafter, Tinelli retained an attorney, Frank Redl, to represent him in connection with his termination. In January 1989, Redl informed the Town that Tinelli, as a civil servant, was entitled to an administrative hearing under N.Y. Civil Service Law § 75 for a formal determination of his

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[1] Redl joined the the law firm of Hankin, Hanig, Stall & Caplicki as "Of Counsel" in May 1994, after the events underlying this lawsuit occurred. On appeal, Tinelli does not challenge the district court's dismissal of the law firm for the action.

employment status.[2] Following a two-day hearing, Tinelli was found guilty of three charges of "misconduct and incompetence" --one charge of failing to enforce the Town code requirements regarding the removal of abandoned vehicles and two charges of abusive conduct toward a colleague and a citizen. Pursuant to those findings, the hearing officer recommended termination of Tinelli's employment. On June 27, 1989, the Town Board adopted the hearing officer's findings and recommendation.

In July 1989, Redl initiated Tinelli's appeal from the administrative hearing decision by filing a notice of petition in the Supreme Court of New York, Dutchess County pursuant to N.Y.C.P.L.R. 78 (the "Article 78 appeal").[3] On October 18, 1989, the Supreme Court transferred the case to the Appellate Division, Second Department, pursuant to N.Y.C.P.L.R.7804(g). Redl took no further action, however, after the initial filing of the petition for Tinelli's appeal. In April 1990, six months after having been

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[2] New York Civil Service Law § 75(1) (McKinney 1999) provides that certain civil servants "shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section."

[3] An appeal pursuant to Article 78 is a special proceeding to challenge, *inter alia*, "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." N.Y.C.P.L.R. 7803(3) (McKinney 1994).

transferred to the Appellate Division, Tinelli's appeal expired.

Following the expiration of his 78 appeal, Tinelli commenced this malpractice suit against Redl in the United States District Court for the Southern District of New York in April 1996. Tinelli alleged, *inter alia*, that Redl's failure to perfect the Article 78 appeal, including his failure to move for an extension of time to perfect, constituted malpractice. The case was referred to Magistrate Judge Douglas F. Eaton for pre-trial proceedings, and, after substantial discovery, Redl moved for summary judgment on all claims. On November 16, 1998, the magistrate judge issued a Report and Recommendation, recommending that Redl's motion be granted, with one exception not relevant to this appeal. With respect to Redl's failure to perfect the Article 78 appeal, the magistrate judge found that the appeal would not have been successful even if it had been perfected and thus concluded that Redl's failure to perfect the appeal did not cause any damage to Tinelli. The district court adopted the magistrate judge's Report and Recommendation in its entirety and entered judgment on February 3, 1999.[4] For the reasons that follow, we affirm the decision of the district court.

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[4] Tinelli also claimed that Redl's poor performance at the administrative hearings constituted malpractice. The district court adopted the magistrate judge's recommendation that Redl's motion for summary judgment be granted as to this claim as well.

DISCUSSION

We review the district court's grant for summary judgment *de novo*. *See Greene v. United States*, 13 F.3d 577, 580 (2d Cir. 1994). Summary judgment is appropriate only when there are no genuine issues of material fact, and the moving party is entitled to prevail as a matter of law. *See Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998). The parties do not dispute that New York substantive law applies in this diversity suit.

In order to prevail on a claim of legal malpractice under New York law, a plaintiff must demonstrate "(1) a duty, (2) a breach of the duty, and (3) proof that actual damages were proximately caused by the breach of the duty." *Marshall v. Nacht*, 569 N.Y.S.2d 113, 114 (2d Dep't 1991). Redl conceded that his failure to perfect the Article 78 appeal satisfies the first two of these requirements. Therefore, the only issue we address here is whether Tinelli has shown that Redl's beach of duty caused any damage, i.e., whether, but for Redl's failure to perfect the Article 78 appeal, Tinelli ultimately would have prevailed on appeal in challenging the finding of misconduct and incompetence and consequent termination of his employment.

Tinelli claims that the court below erred in deciding the issue of causation as a matter of law, contending that the question of whether his Article 78 appeal would have succeeded is a factual matter that should be resolved by a jury. Given the dearth of case law addressing this precise

issue in New York, we cannot say that the state's law is certain on this point.[5] In such circumstances, where the New York Court of Appeals has not spoken on the issue, we must "carefully predict how the highest court of the state would resolve the uncertainty or ambiguity." *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 650 (2d Cir. 1994). This inquiry requires us to look to the decisions of the lower state courts and to consider decisions in other jurisdictions. *See id.*

Upon our review of the decisional law of the lower court of New York and consideration of the underlying rationale for such decisions, we conclude that the New York Court of Appeals would agree with the determination that the question of whether a plaintiff would have prevailed on appeal should be decided as a matter of law. *Cf. Katsaris v. Scelsi*, 453 N.Y.S.2d 994, 996 (Sup. Ct. Broome Co. 1982) ("The judge...must determine what the appellate court would have done...."); *Nunez De Villavicencio v. Cerny*,

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[5] When there is uncertainty in state law in a diversity case, it is often appropriate to certify the unresolved question to the highest court of the state. *See, e.g., Liriano v. Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998); *McCarthy v. Olin Corp.*, 119 F.3d 148, 153-54 (2d Cir. 1997). Certification, however, is not proper where the question does not present a complex issue, there is no split of authority and "sufficient precedents exist for us to make [a] determination." *McCarthy*, 119 F.3d at 153-54. Given the narrowness of the issue presented and the unanimity of extensive precedent -- both in New York and out of New York, see *infra* -- we decline to certify this question.

662 F. Supp. 243, 243-44 (S.D.N.Y. 1987) (following *Katsaris* and determining, as a question of law, how the appellate court would have ruled). Our conclusion is guided, in part, by the decisions of other courts that have considered this issue under the state law of their respective jurisdictions. In fact, "[n]umerous courts have recognized that the determination of whether an appeal not taken would have succeeded is within the exclusive province of the court, not the jury." *Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.*, 718 A.2d 186, 191 (Me. 1998) (footnote and internal quotation marks omitted); *see also Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 783084 & n.40 (Mich. 1994) (noting that at least nineteen jurisdictions have concluded that the determination of whether an appeal would have succeeded is a question of law that "no reported decisions have held otherwise.") (citing cases). Accordingly, we hold that the district court properly decided that the determination of causation of damages here law exclusively with the court.

To rule otherwise -- and hold that a jury should decide how an appellate court would have ruled -- would misconstrue the very nature of appellate review. Appellate courts decide matters as "issue[s] of law, based upon review of the transcript and...the argument of counsel." *Katsaris*, 453 N.Y.S.2d at 996 (quoting Mallen and Levit, Legal Malpractice (2d ed.) § 583, at 738). Here, Tinelli's success in his Article 78 appeal would have turned on a determination of whether the hearing officer's findings

were "supported by substantial evidence" and whether his determinations -- including recommended sanctions -- were "affected by an error of law or [were] arbitrary and capricious or an abuse of discretion." N.Y.C.P.L.R. 7803; *see also Pell v. Board of Educ.*, 34 N.Y.2d 222, 230-32 (1974) (discussing the standard of review in an Article 78 appeal). These are purely questions of law. Because "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), the task of deciding how an appeal would have been resolved must be left to the judge and not the jury. *See Charles Reinhart Co.*, 513 N.W.2d at 777-78 (reasoning that "the nature of appellate practice mandates judicial resolution of the issue" of whether an appellant would have prevailed); *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 628 (Tex. 1989) ("The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules...A judge is clearly in a better position to make this determination.").

In light of the foregoing, we find that the determination of whether Tinelli's "appeal would have been successful intrinsically involves issues of law within the exclusive province of the courts," *Charles Reinhart Co.*, 513 N.W.2d at 784, and hold that the district court properly treated causation as a matter of law. In light of our holding, we reject Tinelli's alternative argument that the court below incorrectly determined that his Article 78 appeal would

have failed. Upon review of the record, we agree with the conclusion of the district court that Tinelli's appeal would not have succeeded because the hearing officer's findings of misconduct and incompetence were supported by substantial evidence and because there was no abuse of discretion recommending Tinelli's termination under the circumstances. We have also reviewed and considered Tinelli's other arguments on appeal and find them to be without merit.

CONCLUSION

For the foregoing reasons, we hereby affirm the order and judgment of the district court granting defendant's motion for summary judgment and dismissing the action.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH V. TINELLI,

Plaintiff,

-against- 96 CIV. 2827 (KMW)

ORDER

FRANK E. REDL, and HANKIN, HANIG, STALL & CAPLICKI,

Defendants.

WOOD, U.S.D.J.

In a Report and Recommendation (the "Report") dated November 17, 1998, Magistrate Judge Eaton recommended that I grant summary judgement in favor of both defendants. Plaintiff has objected to the Report; defendants have responded to plaintiff's objections but have submitted no objections to the Report. Pursuant to 28 U.S.C. § 636 (b) (1) and Fed. R. Civ. P. 72 (b), the Court reviews de novo those aspects of the Report to which the parties object. For the reasons stated below, I adopt the Report in its entirety and accordingly grant summary judgment in favor of both defendants.

I. Background

The facts can be briefly stated as follows, they are set out in detail to the Report, familiarity with which is assumed. In December 1988, the Pawling Town Board unanimously voted to discharge plaintiff from his position as Chief Enforcement Officer, a position he had held since January 1984. Plaintiff retained the legal services of defendant Frank E. Redl ("Redl") to assist him in legal services of defendant Frank E. Redl ("Redl") to assist him in appealing his discharge. Redl represented plaintiff at hearings before David Stein ("Stein"), an attorney appointed as Hearing Officer for the town. At the conclusion of a two day hearing, Stein found that plaintiff was guilty of one charge of nonfeasance (for failure to achieve the timely removal of abandoned vehicles) and two charges of misconduct (for verbally abusing two of his female employees). Seeking to overturn Stein's decision, Redl filed an Article 78 proceeding in Supreme Court, Dutchess County; that court transferred the proceeding to the Appellate Division, Second Department. Redl failed to perfect the appeal within the six-month time limit and failed to move for an extension of time to prefect it. Redl concedes that a jury might find that his failure to perfect the appeal was a departure from accepted standards of professional care. After learning that the Second Department had dismissed his appeal, for Redl's lack of prosecution, plaintiff filed this diversity suit for attorney malpractice.

II. Discussion

Plaintiff claims that Redl committed malpractice in two respects: (1) by performing poorly at the hearings before Stein ("Claim One") and (2) by failing to perfect the appeal challenging Stein's opinion ("Claim Two").[1] (*See* Report at 4.) With regard to Claim One, the Magistrate Judge found that no rational jury could find the Redl's performance before Stein amounted to malpractice. (*See* Report at 6-7.) Plaintiff objects to this aspect of the Report, reiterating his argument that Redl did not ask Stein for a lesser penalty. As explained in the Report, it is clear from the hearing transcript that Redl argued to Stein that termination might be unduly harsh, and that Stein considered the possibility of a lesser penalty. (*See* Stein Opinion at 27-28.) Accordingly, for the reasons stated in the Report, I agree with the Magistrate Judge that Redl's performance at the hearing does not constitute a basis for plaintiff's malpractice claim.

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[1] The Court notes its agreement with the Magistrate Judge that summary judgment should be summarily granted in favor of defendant Hankin, Hanig, Stall & Caplicki because Redl did not join the law firm until May 1994, which was four years after the appeal was deemed abandoned and two months after plaintiff learned of Redl's failure to perfect the appeal. In his objections to the Report, plaintiff suggests that the law firm should be liable because at the time Redl joined the firm the deadline for applying for an extension to perfect the appeal had not expired. The Court finds that this assertion alone, even if true, is insufficient to state a claim for legal malpractice on the part of the law firm.

Claim Two (that Redl failed to perfect the appeal to the Second Division) forms the primary basis for plaintiff's malpractice claim. As noted in the Report, an action for damages for legal malpractice in New York "requires proof of three essential elements: (1) a duty, (2) a breach of the duty, and (3) proof that actual damages were proximately caused by the breach of the duty." *Marshall v. Nacht*, 569 N.Y.S.2d 113, 114 (2d Dep't. 1991). Because Redl concedes the first two elements, the Magistrate Judge properly considered only the question of whether plaintiff's appeal would have succeeded had Redl perfected it.

The Magistrate Judge first determined that the question of whether an appeal would have been successful is a question of law to be decided by the "review of the transcript and record of the underlying action, the argument of counsel and subject to the same rules of review as should have been applied by the appellate courts." *Katsaris v. Scelsi*, 453 N.Y.S.2d 994, 996 (Sup. Ct., Broome Co. 1982); *Nunez De Villavicencio v. Cerny*, 662 F. Supp. 243 (S.D.N.Y. 1987) (following *Katsaris*).[2] In deciding the

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[2] In his objections to the Report, plaintiff argues that the question of whether an appeal would have succeeded is one of fact and not one of law. Plaintiff objects to the Magistrate Judge's reliance on *Katsaris* and states that *Katarsis* is hardly a definitive statement of New York law on this issue." Pl. Objs. At 6. As authority for its position, plaintiff cites only to *Chockfoot v. Smith*, 571 P.2d 1255 (Or. 1977). This Court notes that *Katarsis* is still good law in New York; the Court is not persuaded to the contrary by plaintiff's citation to a twenty-one year old Oregon state court decision.

question of whether the Appellate Division would have affirmed Stein's report, Magistrate Judge Eaton applied the legal standard set out in *Matter of Pell v. Board of Educ. of Union Free School Dist. No.1*, 356 N.Y.S.2d 833 (Ct. App. 1974).[3] Ruling on five civil service disciplinary proceedings, the Court in Pell held that if there is "substantial evidence" to support a Hearing Officer's determination, then "the courts have no alternative but to confirm his determination unless he acted in excess of his jurisdiction, or in violation of lawful procedure, or arbitrarily, or in abuse of his discretion." *Id* at 839. Article 78 limits judicial review to "such abuses of discretion as were tantamount to a true question of law." *Id.* at 840. The Magistrate Judge then considers the two arguments put forth by plaintiff: (1) that the record before Stein did not contain "substantial evidence" of misconduct, and (2) that Stein abused his discretion by recommending that the penalty of termination. In response to plaintiff's first argument, Magistrate Judge Eaton explains that Redl and his adversary produced and questioned witnesses over the course of a two day hearing, submitted documentary evidence, and prepared written arguments. (*See* Report at 10-11.) Thus, the Magistrate Judge concluded that the record contained "substantial evidence" to support Stein's finding of guilt. In response to plaintiff's second argument, the Magistrate Judge examined the affidavits submitted by

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[3] Both parties agree that, had plaintiff appealed, the Appellate Division would have been bound by the standard set forth in *Matter of Pell.*

both parties' legal experts and the relevant case law, and the Magistrate Judge concluded that Stein did not abuse his discretion by recommending the penalty of termination. (*See* Report at 11-14.)

In his objections, plaintiff emphasizes that Redl admitted to not knowing the exact legal standard that the Appellate Division would apply to plaintiff's appeal. Plaintiff argues that, because Redl did not realize that the Appellate Division would have to determine whether there was "substantial evidence" presented to the Hearing Officer, he could not have presented enough evidence to Stein to preserve the appeal. (*See* Pl. Objs. at 3-4.) This Court finds that, although Redl may not have understood the precise legal standard in an appeal of an Article 78 proceeding, it does not necessarily follow that Stein did not have sufficient evidence before him to support his findings. As explained in the Report, Stein heard from several witnesses, including plaintiff, and reviewed many documents from both parties prior to issuing his 30-page opinion. For the reasons set forth in the Report, the Court finds that Stein had sufficient evidence before him to render his opinion.

Plaintiff's objections also assert that Stein abused his power in recommending termination because plaintiff's charges involved "no moral turpitude such as larceny or bribe taking." Pl. Obj. at 10. As Magistrate Judge Eaton indicates, in the consolidated *Pell* cases, the court gave a clear indication that courts should defer to a municipality's

decision to fire an employee. The Court in that case unanimously rejected any softening of the penalty of termination for a teacher who improperly took 21 days of sick leave, a policeman who worked a second job on two occasions while on sick leave, and a token clerk who stole $1.26. *See Matter of Pell*, 356 N.Y.S.2d at 843-44; *Matter of Abbott, id.* 846-847; *Matter of Best, id.* at 846. (*See* Report at 13.) In light of this legal standard, which would have required the Appellate Court to afford extraordinary deference to Stein's decision, the Court finds that there is no authority to support plaintiff's proposition that termination is a proper penalty only in cases involving "moral turpitude." Thus, for the reasons stated in the Report, this Court finds that the Appellate Division would have found that Stein did not abuse his discretion when he recommended termination and stated valid reasons for that penalty. (*See* Report at 11-14.) Accordingly, the Court finds that, as a matter of law, Redl is entitled to summary judgment because plaintiff is unable to show that actual damages were proximately caused by Redl's alleged negligence.

III. Conclusion

For the reasons stated above, plaintiff's motion for summary judgment is granted as to both defendants. The Clerk of Court is hereby directed to close this case. All pending motions are moot.

SO ORDERED.

DATED: New York, New York
February 3, 1999

s/Kimba M. Wood
Kimba M. Wood
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

REPORT AND RECOMMENDATION
TO JUDGE WOOD

JOSEPH V. TINELLI, SR.,
Plaintiff,

-against- 96 Civ 2827 (KMW) (DFE)

FRANK E. REDL, and HANKIN, HANIG,
STALL & CAPLICKI,
Defendants.

DOUGLAS F. EATON,
United States Magistrate Judge.

In this action for attorney malpractice, discovery has been completed. The defendants moved for summary judgment on 5/15/98. Plaintiff's attorney requested three months to respond; I granted this request and he served opposing papers on 8/13/98. The defendants served reply papers on 9/11/98.

For the reasons set forth below, I recommend that the Court grant summary judgment, with one potential exception described in my Conclusion.

FACTUAL BACKGROUND

In January 1984 plaintiff Tinelli was hired by the Town of Pawling ("Town") as its Chief Enforcement Officer. As such, he was a department head and a supervisor, charged with monitoring and enforcing state and local building codes. In December 1988, the Town Board unanimously voted to discharge him and it notified him by letter that the Town was not rehiring him for 1989. Plaintiff retained the legal services of defendant Redl, a sole practitioner. Redl promptly notified the Town that Tinelli's job was a civil service position and that he was entitled to a hearing before and independent hearing officer pursuant to New York Civil Service Law § 75. Redl represented him at hearings in March 1989 before David Stein, a New Jersey attorney appointed as the Hearing Officer. The transcript of the hearings (436 pages on two days) is annexed to the 9/11/98 affidavit of Debora Pitman. Post-hearing briefs were submitted by the Town's attorney and then by Redl. *See* Exhs. H and G to the Notice of Motion. In June 1989 Stein issued a 30-page opinion. *See* Exh. J to the Notice of Motion (hereinafter "Stein's Opinion").

Stein found that plaintiff was guilty on one charge of nonfeasance (failure to achieve the timely removal of abandoned vehicles) and two charges of misconduct (verbally abusing two women). Stein's detailed findings

are important, so I have annexed, at the end of this report, pages 1-8 and 23-25 of Stein's Opinion. Stein, who was able to observe plaintiff, concluded as follows:

> Tinelli is an intemperate individual. The evidence indicates he lacks respect for women as equals. The realities of this society in the late twentieth century is that Tinelli, with his attitude toward the distaff sex, has the potential to incur legal liability on the Town's behalf.
>
> In addition, Tinelli's behavoir had the effect of compelling Ms. Evanson to leave her position with the Town. Evanson was a potentially valuable asset, with an undergraduate degree in architecture and a graduate degree from Yale. Tinelli's brief indicates that he found no fault with Evanson's performance. Moreover, Tinelli testified that his workload, with Evanson on staff, was so heavy that he was unable to carry out his responsibilities. Tinelli needed Evanson! Yet, he forced her out of the door. Tinelli's conduct was contrary to the Town's interests at the time.
>
> Moreover, Tinelli showed that he lacked the self-control necessary to justify his continuation in office, and there is no reason to believe that he would refrain from screaming at women in the future. I conclude, therefore, that it would be futile to reinstate Tinelli.

See Stein's Opinion at 28-29. In June 1989 the Town Board unanimously adopted Stein's recommendation. *See* Exh. K.

Seeking to overturn the decision of the Hearing Officer and the Town Board, attorney Redl filed an Article 78 proceeding in Supreme Court, Dutchess County; that court transferred the proceeding to the Appellate Division, Second Department in October 1989. *See* Exhs. L and N. Within six months after the date of a transfer order, an appeal is deemed abandoned unless the appellant files the papers necessary to perfect the appeal. 22 NYCRR § 670.8. Redl failed to perfect the appeal and failed to move for an extension of time to perfect. He claims that a Second Department clerk misled him but, for purposes of this summary judgment motion, he concedes that a jury might find that his failures were a departure from accepted standards of professional care.

Meanwhile, Redl also represented plaintiff in other claims against the Town. In November 1990 Redl sued the Town for wages for the six months between the Town's discharge action and the Town's adoption of Stein's recommendation. And back in April 1989, Redl filed a complaint with the New York Department of State alleging that the Town had failed to prosecute code violations which plaintiff had issued to the Town Crier Restaurant prior to his discharge. After many extensions of time and a submission of written arguments, the Department of State ruled that plaintiff had no standing to complain about the

Town Crier Restaurant -- a ruling that was later upheld by Justice George Bernhard in Supreme Court, Dutchess County.

In March 1994 plaintiff, having consulted another lawyer, learned that the Second Department had dismissed, for Redl's lack of prosecution, the appellate challenge to Stein's decision. Plaintiff, having moved to Arizona, invoked our Court's diversity jurisdiction and brought the present suit for attorney malpractice.

PLAINTIFF'S CLAIMS

Initially, it seemed that plaintiff was claiming that Redl had committed malpractice in five respects:

(1) performing poorly at the hearings before Stein;

(2) failing to perfect the appeal challenging Stein's Opinion;

(3) failing to perfect a separate appeal from Justice Bernhard's ruling that plaintiff lacked standing to complain about the Town Crier Restaurant;

(4) failing to collect $13, 411 which the Town allegedly owed the plaintiff for six months of back pay (Redl obtained a settlement offer of $11,000, which plaintiff rejected, *see* Exhs. S and T); and

(5) failing to get involved in plaintiff's allegation that his firing was motivated by his age (69) and disability (a heart attack) (the State Division of

Human Rights investigated this allegation and rejected it, *see* Exh. TT).

However, it is now clear that plaintiff is not pressing claims 3, 4 and 5. As to claim 3, he has not produced any argument showing error in Justice Bernhard's ruling that plaintiff lacked standing to complain about the Town Crier Restaurant. As to claims 4 and 5, plaintiff has not produced any expert opinion specifying malpractice, nor any evidence that a better attorney would have produced a better result. Moreover, the Defendants' 5/15/98 Memorandum (at pp. 18-24) carefully demolished claims 3, 4 and 5 -- and Plaintiff's 8/11/98 Memorandum did not meet those arguments. *See* 9/11/98 Reply Memorandum at pp. 19-20.

Accordingly, plaintiff has reduced his case to claims 1 and 2. Preliminarily, I note that the second defendant (the law firm of Hankin, Hanig, Stall & Caplicki) had no involvement in claims 1 and 2. Claim 1 involves Redl's performance at the "Stein" hearings, which took place in 1989 in Tinelli's presence. Claim 2 involves Redl's failure to perfect the "Stein" appeal; that failure did not take place in Tinelli's presence, but Tinelli learned of it in March 1994 -- two months before Redl joined the Hankin law firm. *See* Tr. 105 of Exh. A to 8/12/98 Aretakis aff., and *see* Defs' Rule 56.1 St. at ¶ 5. Redl did not join the Hankin firm until May 1994. Hence it is crystal clear that the Hankin firm is entitled to summary judgment. I turn now to the case against Redl.

1. Redl's performance at the hearings before Stein

On claim 1, Tinelli makes only two points, and in a very perfunctory fashion.

a. Redl's alleged failure to ask Stein to consider a lesser penalty.

Plaintiff's Memorandum, at page 8, falsely asserts as follows:

> The Hearing Officer was not asked by the defendant REDL to consider, nor did the Hearing Officer consider any reduced penalty or punishment other than termination.

On the contrary, see pp. 15-17 of Redl's post-hearing brief, Exh. G to the Notice of Motion. And see Stein's Opinion (Exh. J) at p. 22:

> The Respondent concludes that as he is not guilty of any of the charges, the charges should be dismissed.
>
> However, were he found guilty of any of the charges, the Respondent urges that dismissal would be an unduly harsh and unjust penalty.
>
> Moreover, he attacks the cases cited by the town as inapposite on the grounds that in those cases the discharged employees had been engaged in a longstanding pattern of conduct, whereas the Respondent has been accused only of isolated incidents.

Moreover, Stein's Opinion at pp. 27-28 shows that he carefully considered the option of a lesser penalty:

I find that termination is the appropriate penalty for the Respondent's guilt of the First, Second and Fourth Charges. Tinelli's failure to achieve the timely removal of the abandoned vehicles from the Sonita Road property would not, standing alone, justify Tinelli's dismissal.

Rather, it is Respondant's misconduct and imcompetance in dealing with Mrs. Ford and Ms. Evanson which underlies my recommendation that the Town discharge Mr. Tinelli.

b. Redl's alleged failure to bring some documents to Stein's attention.

Plaintiff's Memorandum, at p. 8, also asserts:

> The Defendant REDL failed to have documents responsive to subpoenas produced by the Town of Pawling at the plaintiff's March 17, 1989 and March 24, 1989 hearings.

Those subpoenaed documents were identified as Tinelli's desposition as "evaluations regarding my conduct, evaluations regarding the performance of my duties, evaluations in the performance of resolving problems." *See* Tr. 151 of Exh. A to 8/12/98 Aretakis aff. But Redl testified:

> The Town was not contesting the fact that he had a clean [prior] record. There was really no sense, nothing to be gained by introducing the [personnel] file.

See Tr. 80 of Exh. B to 8/12/98 Aretakis aff. This statement, taken from Redl's desposition, was submitted as an exhibit by plaintiff. Plaintiff's papers, however, do not dispute that "[t] he Town was not contesting the fact that he had a clean [prior] record." Tinelli's prior record with the Town covered only five years. *See* the second day of Hearing at Tr. 94. In any event, Stein's Opinion is consistent with an undisputed assumption that Tinelli had a clean prior record. Redl had no obligation to waste time by documenting what was undisputed.

Accordingly, no rational jury could find that Redl's performance before Stein amounted to malpractice.

2. Redl's failure to perfect the appeal challenging Stein's Opinion

Under New York law, an action for damages for legal malpractice "requires proof of three essential elements: (1) a duty, (2) a breach of the duty, and (3) proof that actual damages were proximately caused by the breach of the duty." *Marshall v. Nacht*, 569 N.Y.S.2d 113, 114 (2d Dep't 1991). For purposes of this summary judgment motion, Redl concedes the first two elements -- he assumes that a jury might find that his failure to perfect the appeal was a departure from accepted standards of care. But he submits that plaintiff is unable to prove the third element, because plaintiff is unable to prove that the appeal would have been successful.

The question of whether an appeal would have been successful is a question of law -- a question to be decided

by "review of the transcript and record of the underlying action, the argument of cousel and subject to the same rules of review as should have been applied by the appellate courts." *Katsaris v. Scelsi*, 453 N.Y.S.2d 994, 996-97 (Sup. Ct., Broome Co. 1982), quoted and followed by Judge Metzner in *Nunez De Villavicencio v. Cerny*, 662 F. Supp. 243 (S.D.N.Y. 1987). *Accord, Charles Reinhart Co. v. Winiemko*, 444 Mich. 579 (1994) (discussing and following *Katsaris* and decisions from 19 other jurisdictions). Even more recently, *accord, Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.*, 718 A.2d 186 (Me. 1998). Defendants' 5/15/98 Memorandum annexes the full text of *Charles Reinhart*, and Defendants' 9/11/98 Reply Memorandum annexes the full text of *Steeves*. Plaintiff cites no case to the contrary, in New York or any other jurisdiction. Accordingly, I am confident that *Katsaris* accurately states the law of New York.

Our Court must decide, therefore, the following question of law: Would the Appellate Division have affirmed Stein's report if Redl had perfected the appeal? In deciding this question, we are bound (as the Appellate Division would be bound) by the standards set forth in the leading case from the highest court of New York. That case is *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1*, 356 N.Y.S.2d 833 (Ct. App. 1974). Ruling on five civil service disciplinary proceedings, *Pell* stated emphatically:

> [N] either the Appellate Division nor the Court of Appeals has power to upset the determination of an

> administrative tribunal on a question of fact * * * beyond seeing to it that there is "substantial evidence."

Pell, 356 N.Y.S.2d at 839, quoting Cohen and Kroger, *Powers of the New York Court of Appeals*, § 108, p. 460. If there was "substantial evidence" to support the Hearing Officer's determination, then "the courts have no alternative but to confirm his determination" unless he acted in excess of his jurisdiction, or in violation of lawful procedure, or arbitrarily, or in abuse of his discretion. *Id.* at 839. Article 78 limits judicial review to "such abuses of discretion as were tantamount to a true question of law." *Id.* at 840.

In our case, Tinelli argues that (a) the record before Hearing Officer Stein did not contain "substantial evidence" of misconduct, and (b) that Stein abused his discretion by recommending the penalty of termination. On these two issues, each side has presented a distinguished attorney's opinion. Plaintiff's expert is Steven J. Ahmuty, Jr., who writes a column in the New York Law Journal on appellate practice. His affidavit is annexed to the 8/12/98 Aretakis affidavit. Defendant's expert is Maurice F. Curran, who successfully appealed on behalf of the Trustees of Mamaroneck is one of the five cases consolidated before the New York Court of Appeals in *Pell*. Mr. Curran's opinion is at Exhibit DDD to the Notice of Motion. I have carefully considered the opinions of both men.

a. <u>The record contained "substantial evidence"</u>

to support Stein's detailed findings.

In the March 1989 hearings, Redl and his adversary produced and questioned witnesses, submitted documentary evidence, and prepared written arguments. The record thus created contained "substantial evidence" to support Stein's finding of guilt.

When Tinelli spoke with Mrs. Ford, a Town resident, his conduct was abusive. A witness testified that she overheard Tinelli tell Mrs. Ford said "she was just a housewife, and ... he would only do business through her attorney." The volume of Tinelli's voice during this exchange was so loud that it upset the overhearing witness. *See* 3/17/89 Hearing Tr. 26-28.

When Tinelli spoke with Ms. Evanson, a new employee with an architecture degree from Yale, she was "shaken" and "stunned." *See id.* at Tr. 91-92. The incident was overheard by Margaret Meany, who testified in detail that Tinelli was "screeching" and "screaming" for ten minutes, that she told him his conduct was inappropriate, and that Tinelli responded that "He had a right to do that because he was a man and men are allowed to say that ... a man can talk like that, unless you are a gay from California." *See id.* at Tr. 131-38. At the second day at Tr. 219-21, Tinelli testified that he did not remember this conversation with Meany, but conceded that she was "a sincere person." As to Tinelli's credibility, Stein found that Tinelli torpedoed himself by engaging in a ruse during the first part of his testimony:

> Tinelli's attempt to convince me that his normal voice was piercingly loud by screaming his testimony was ludicrous. He rapidly exhausted himself and testified at a clear, but normal conversational level. This fruitless ruse completely undermined Tinelli's credibility.

See Stein's Opinion at pp. 23-24, and *see* second day of Hearing at Tr. 109-10, 211-15.

b. Stein did not abuse his discretion by recommending the penalty of termination.

In *Pell* the Court of Appeals ruled that a hearing officer abuses his discretion when "a result is shocking to one's sense of fairness." *Pell*, 356 N.Y.S.2d at 842. One's sense of fairness is shocked "if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct ... or to the harm or risk of harm to the agency or institution ...." *Id.*

Stein found that Tinelli's behavior towards women clearly presented a risk of harm to the Town in the form of potential lawsuits. Moreover, he found that Tinelli's conduct had already harmed the Town, by compelling Ms. Evanson, a valuable employee, to leave (until he was fired). *See* Stein Opinion at pp. 28-29, quoted at page 2 of this Report. Moreover, Stein (who had observed Tinelli for two full days) found that "Tinelli showed that he lacked the self-control necessary to justify his continuation in office, and there is no reason to believe that he would refrain from

screaming at women in the future." *See* Stein Opinion at p. 29.

In spite of all this, Mr. Ahmuty's affidavit, at ¶ ¶ 12, 16 and 18, opines in conclusory fashion that the Appellate Division would have found that termination was an abuse of discretion. But Mr. Ahmuty does not note Stein's reasons, let alone refute them.

In the consolidated *Pell* cases, the high court of New York gave a clear idea of how very deferential courts should be to a municipality's decision to fire an employee. By a vote of 7 to 0, the Court rejected any softening of the penalty of termination for (a) a teacher who improperly took 21 days of sick leave, (b) a policeman who worked a second job on two dates while on sick leave and (c) a token clerk who stole $1.26. *See Matter of Pell*, 356 N.Y.S.2d at 843-44; *Matter Of Abbott, id.* at 846-47; *Matter of Best, id.* at 846. Moreover, the Court stated:

> While heretofore the courts have, in some instances, considered prior good records of service and revoked a sentence of dismissal, substituting therefor a lesser penalty ..., it is becoming increasingly clear that the nature of the misconduct charge when weighed with the action taken, where such action is reasonably within the permissible scope of the disciplinary agency, must be accorded greater weight or recognition.

See id. at 846.

In 1987 the Court of Appeals spoke again on the subject of civil service disciplinary hearings:

> It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record. The Hearing Officer before whom the witnesses appeared, on the other hand, was able to perceive the inflections, the pauses, the glances and gestures--all the nuances of speech and manner that combine to form an impression of either candor or deception. * * * "The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists" ....

Berenhaus v. Ward, 522 N.Y.S.2d 478, 481-82 (Ct. App. 1987).

The Appellate Divisions have heeded the clear messages of *Pell* and *Berenhaus*. The cases cited to Hearing Officer Stein in the Town's brief, Exh, H at pp. 22-25, included *Koch v. Webster Central School Dist.*, 453 N.Y.S.2d 491 (4th Dep't), *aff'd*, 457 N.Y.S.2d 477 (Ct. App. 1982) (school custodian "had a long record of competent service" but was properly terminated because he "hollered at, insulted and abused his co-employees") and *Botkin v. Board of Education*, 504 N.Y.S.2d 521 (2nd Dep't 1986) (3-1) (school secretary for over 12 years was properly terminated

because "she had shouted at various staff members and had refused to follow orders of her supervisor").

Moreover, in 1998 Redl's attorney searched for every decision which reviewed an administrative disciplinary decision and cited to *Pell* -- in Appellate Division Reports 2d, volumes 133 through 176, covering the period from October 1987 to September 1991 (two years before and two years after the Second Department received Redl's unperfected Article 78 appeal). This research revealed that, in those four years, the four Appellate Divisions rejected the vast majority of Article 78 appeals which cited *Pell* (45 out of 48). *See* Defs' Reply Mem., pp. 11-16. Of the three appeals that were not rejected, two cases were not on point. *See id.*, pp. 15-16. Only one case presents even a glimmer of hope for plaintiff. That one case was *McFadden v. Board of Education*, 544 N.Y.S.2d 885 (2d Dep't 1989), in which the Second Department slightly reduced the suspension of a school teacher for verbally abusing students. In an extremely terse opinion, the Second Department found that the record contained substantial evidence to support the finding of guilt; it merely ruled that the nine-month suspension without pay was excessive, and suggested a penalty of no more than six months.

In view of all of these factors, I am firmly convinced that the Appellate Division would have found that Stein did not abuse his discretion when he recommended termination and articulated sensible reasons for that penalty.

CONCLUSION

As set forth above, I conclude that no rational jury could find in favor of Tinelli's perfunctory claim that Redl's performance in front of Stein was inadequate. I also conclude that the Appellate Division would have affirmed Stein's Opinion if Redl had perfected the appeal. I recommend that the Court grant summary judgment in favor of Redl, with one potential exception -- if Tinelli has evidence that he paid money to Redl for any work that Redl performed after June 1989 on the appeal from the Stein Opinion, then Tinelli should be allowed to sue for the return of that money, and indeed to move for summary judgment for that amount.

Pursuant to 28 U.S.C. 636(b)(1)(B), any party may object to this recommendation within 10 business days from November 16, 1998 by filing written objections with the Clerk of the U.S. District Court and mailing copies (a) to the opposing party, (b) to the Hon. Kimba M. Wood, U.S.D.J. at Room 1610, 500 Pearl Street, New York, NY 10007 and (c) to me at Room 740, 500 Pearl Street. Failure to file objections within 10 business days will preclude appellate review. See 28 U.S.C. 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988). Any request for an extension of time must be addressed to the District Judge.

s/DOUGLAS F. EATON

DOUGLAS F. EATON
United States Magistrate Judge

Dated: New York, New York
November 16, 1998

Supreme Court, U.S.
FILED
JUN 19 2000
CLERK

(2)

No. 99-1807

IN THE

Supreme Court of the United States

JOSEPH V. TINELLI, SR.,

Petitioner,

v.

FRANK E. REDL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Did the Court of Appeals for the Second Circuit properly decline to certify an unresolved question of state common law to the highest court of the state and decide the question, relying solely on lower court precedent and decisions from other jurisdictions, and hold that under New York law the question whether the failure to perfect an appeal caused damages was a question of law for the Court and not a question of fact for the jury?

B. By declining to certify an unresolved question of state common law to the highest court of the state did the Court of Appeals for the Second Circuit give rise to a conflict with the decisions of this Court and other Circuit Courts concerning the applicable principles for determining the propriety of certification?

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B. By declining to certify an unresolved question of state common law to the highest court of the state, the Court of Appeals for the Second Circuit acted consistently with the precedents set out by this Court and created no conflict with the decisions of other Circuit Courts concerning the applicable principles for determining the propriety of certifying such questions.	10
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STATEMENT OF THE CASE

Petitioner was retained by the Town of Pawling, New York (the "Town") as Chief Code Enforcement Officer ("CEO") in 1984. In December, 1988, the Town's Board voted to discharge Petitioner after five years of service. Petitioner retained Respondent, a solo practitioner, in connection with the Town's action.

Respondent advised the Town that its discharge of Petitioner violated the requirements of N.Y. Civ. Serv. L. § 75 (McKinney 1986) ("N.Y. Civ. Serv. L. §75")[1]. Thereafter, the Town served Petitioner with a Notice of Hearing, Statement of Charges and an Amended Statement of Charges. In March, 1989, two full days of hearings concerning the Town's charges against Petitioner were held before Stein, an impartial arbitrator appointed by the Town pursuant to N.Y. Civ. Serv. L. § 75.[2] Respondent represented Petitioner during these hearings.

In June, 1989, Stein issued his Opinion, Findings of Fact and Recommendation finding Petitioner guilty of two charges relating to his conduct toward women and one charge of failing to enforce the Town Code and recommending that

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1. N.Y. Civ. Serv. L. § 75(2) requires that a person against whom removal or other disciplinary action is proposed receive written notice thereof and be furnished with a copy of the charges and be allowed at least eight days for answering the same in writing.

2. N.Y. Civ. Serv. L. § 75(2) provides in relevant part that "[t]he hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for such purpose."

Petitioner be discharged. The Town Board unanimously adopted Stein's recommendation and discharged Petitioner.

In July 1989, Respondent filed an Article 78 proceeding (the "Article 78 proceeding"), essentially an appeal,[3] seeking to annul the Town's discharge of Petitioner. The Article 78 proceeding was transferred to the Appellate Division of the New York State Supreme Court at the Town's request, pursuant to N.Y. Civ. Prac. L. & R. 7804(g) (McKinney 1987) on October 18, 1989. The time to perfect the Article 78 proceeding expired in April, 1989. Respondent did not perfect the Article 78 proceeding nor did Respondent seek to enlarge the time in which to do so.

On April 18, 1996, petitioner commenced this action in the United States District Court for the Southern District of New York invoking that Court's diversity jurisdiction to recover damages against Petitioner,[4] *inter alia*, for legal malpractice. After the conclusion of discovery, Respondent moved for summary judgment asserting that Petitioner had failed to state any claims upon which relief could be granted. In support of that motion, Respondent admitted commencing but not perfecting the Article 78 proceeding and admitted that he did not move to enlarge the time to perfect the Article

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3. An appeal pursuant to Article 78 is a special proceeding to challenge, *inter alia*, "whether a determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." N.Y. Civ. Prac. L. & R. 7803 (McKinney's 1994).

4. Petitioner did appeal from that part of the District Court's Order that granted summary judgment in favor of co-defendant Hankin, Hanig, Stall & Caplicki.

78 proceeding. Respondent argued that under the applicable law, Petitioner would have been unsuccessful had the Article 78 proceeding been perfected. Accordingly, Respondent's failure to perfect the Article 78 proceeding did not cause Petitioner to suffer any damages. For purposes of the summary judgment motion, Respondent assumed, *arguendo,* but did not concede that he had a duty to perfect the Article 78 proceeding.[5]

In a Report and Recommendation dated November 17, 1998, United States Magistrate Judge Douglas Eaton recommended that summary judgment be granted to Respondent holding that

> the question of whether an appeal woul.' have been successful is a question of law — a question to be decided by "review of the transcript and record of the underlying action, the argument of counsel and subject to the same rules of review as should have been applied by the appellate courts."

(Appendix C, C-9-10). The Magistrate Judge, applying the New York Court of Appeals criteria for review of administrative hearings in Article 78 proceedings, found that the record of the Stein Hearings contained "substantial evidence" to support Stein's detailed findings and that Stein did not abuse his discretion in recommending Petitioner's discharge. (Appendix C, C-11-16). Finding that the Article

5. Petitioner misstates the facts by asserting that "[Respondent] conceded having had a duty and breaching it." (Petition at 5). Respondent's assumption, that he had a duty was duly noted by the Magistrate Judge in his Report and Recommendation. (Appendix C-9).

78 proceeding would not have been successful, the Magistrate Judge concluded that Petitioner had not suffered any damages as result of Respondent's failure to perfect the Article 78 proceeding.

On January 2, 1999, Petitioner objected to the Report and Recommendation arguing that causation issues were factual determinations and that the question whether the Article 78 proceeding would have been successful should not have been decided summarily, but rather, should have been presented to a jury. By Order dated January 27, 1999, The United States District Court for the Southern District of New York accepted the Report and Recommendation in its entirety and granted summary judgment to Respondent ruling that the question of an appeal's success, when raised in a legal malpractice action, was a question of law to be decided by the Court. (Appendix B, B-4). Judgment was entered in favor of Respondent on February 3, 1999. On March 2, 1999, Petitioner filed a Notice of Appeal from the District Court's judgment.

During oral argument of Petitioner's appeal, the Second Circuit raised, *sua sponte,* the possibility of certifying to the New York Court of Appeals the question of whether the success of an appeal when forming the basis for a legal malpractice action was one of law or one of fact. (Appendix A, A-7). Relying on the decision of a New York trial court and the opinions of 21 other jurisdictions who had uniformly addressed the issue, the Second Circuit declined to certify the question and predicted that the New York Court of Appeals would rule that in a legal malpractice action, the question whether damages resulted from an attorney's failure to perfect an appeal was a question of law to be decided by the Court. (Appeal A, A-7-8).

The Second Circuit affirmed the District Court's decision addressing only the issue of whether Petitioner had shown that Respondent's "breach of duty caused any damage, i.e., whether, but for [Respondent's] failure to perfect the Article 78 Appeal, [Petitioner] ultimately would have prevailed on appeal in challenging the finding of misconduct and incompetence and consequent termination of his employment." (Appendix A, A-6).

On March 17, 2000, Petitioner filed a Petition for a Writ of Certiorari from the Order and Judgment of the United States Court of Appeals for the Second Circuit in *Tinelli v. Redl*, 199 F.3d 603 (2d Cir. 1999). The petition was docketed on May 12, 2000. By letter dated June 7, 2000, Respondent's counsel requested an additional seven days in which to file Respondent's Brief in Opposition. By letter dated June 8, 2000, this Court granted Respondent an extension of seven days up to and including June 19, 2000 to file Respondent's Brief in Opposition. Respondent's Brief in Opposition is filed on June 19, 2000, pursuant to Supreme Court Rule 15.3 as extended by the Clerk of this Court.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals for the Second Circuit properly declined to certify an unresolved question of state common law to the highest court of the state and decided the question, relying solely on trial court precedent and decisions from other jurisdictions, holding that under New York law the question whether the failure to perfect an appeal caused damages was a question of law for the Court and not a question of fact for the jury.

The rules of the Second Circuit permit certification of a question of law to the New York Court of Appeals where there is no controlling New York precedent on an issue. The Second Circuit may "certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before [the] Court." U.S. Ct. of App. 2nd Cir. Rule § 0.27 (1999). The correlative provision in the rules of the New York Court of Appeals gives that court the discretion to accept or reject a question so certified.

> Whenever it appears to the . . . United States Court of Appeals . . . that determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive questions of law to the [New York] Court of Appeals.

N.Y. Comp. Codes R. & Regs tit. 22 § 500.17.

The decision of a federal court to certify questions of law pursuant to state established procedures of this type rests in the sound discretion of the court. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Historically, the Court of Appeals for the Second Circuit has only certified questions to the New York Court of Appeals in the following three circumstances: (i) where there is a split of authority on an issue; (ii) where the statute's plain language is subject to more than one interpretation or does not indicate the answer; or (iii) when presented with a complex question of New York common law for which no New York authority can be found. *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 51 (2d Cir. 1992).

However, even where the law of a state may be uncertain, a federal court may deny certification where it believes it can "predict" how the state court would resolve the ambiguity. *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994). In making this prediction, the federal court may be guided by decisions of lower state courts, *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 850 (2d Cir. 1994), and relevant cases from other jurisdictions. *Bank of New York v. Amoco Oil Co.*, 35 F.3d 643, 650 (2d Cir. 1994).

Petitioner contended that Respondent was liable for legal malpractice in failing to perfect the Article 78 proceeding. To prevail on a claim for legal malpractice under New York law, a plaintiff must demonstrate "(1) a duty, (2) a breach of the duty, and (3) proof that actual damages were proximately caused by breach of that duty." *Marshall v. Nacht,* 172 A.D.2d 127, 569 N.Y.S.2d 113, 114 (2d Dept. 1991). Respondent contended that had the Article 78 proceeding been perfected, it would not have been successful.

Accordingly, Petitioner could not show that the failure to perfect the Article 78 proceeding caused Petitioner any damages. On appeal to the Court of Appeals for the Second Circuit, Petitioner claimed that the District Court erred in deciding the issue of causation as a matter of law, contending that the question of whether the Article 78 proceeding would have succeeded was a factual matter to be resolved by a jury. (Appendix A, A-6).

In affirming the District Court, the Second Circuit acknowledged that there was a dearth of case law addressing this issue in New York. *Id.* The Second Circuit initially relied on existing trial court precedent as set out in *Katsaris v. Scelsi*, 453 N.Y.S.2d 994, 996 (Sup. Ct. Broome Co. 1982) ("The judge . . . must determine what the appellate court would have done . . .") and *Nunez De Villavicencio v. Cerny*, 662 F. Supp. 243, 243-44 (S.D.N.Y. 1987) (following *Katsaris* and determining, as a question of law, how the appellate court would have ruled). (Appendix A, A-7-8). Such reliance on these decisions by the Second Circuit is consistent with this Court's recognition that trial court decisions are "nevertheless laws of the state although the highest court of the state has never passed upon them." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); *see also City of Houston v. Hill*, 482 U.S. 451, 470 (1987) (recognizing that trial rulings on questions of state law are binding).

The Second Circuit then relied on decisions of other jurisdictions citing *Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.*, 1998 Me. 210, 718 A.2d 186, 191 (Me. 1998) ("numerous courts have recognized that the determination of whether an appeal not taken would have been successful is within the exclusive providence of the court, not the jury." *Id.*) and *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579,

513 N.W.2d 773, 783-84 n.40 (Mich. 1994) (noting that at least nineteen jurisdictions have concluded that the determination of whether an appeal would have been successful is a question of law and that "no reported cases have held otherwise") (citing cases). (Appendix A, A-8). In holding that the District Court properly decided that the determination of causation of damages on the facts presented was exclusively a question of law, the Second Circuit stated that to rule otherwise "would misconstrue the very nature of appellate review." (Appendix A, A-8). Notably, Petitioner has not cited and cannot cite a single case which holds to the contrary.[6]

Petitioner misstates the scope of the Second Circuit's decision describing the question broadly as "the complex issue of causation." In fact, the Second Circuit declined to certify the question specifically noting "the narrowness of the issue presented and the unanimity of extensive president — both in New York and out of New York." (Appendix A, A-7). Even where this Court has recognized the importance of federal abstention pending certification, this Court has recognized that the availability of certification is not in itself a sufficient reason to abstain from deciding an issue of state law. *Bellotti v. Baird*, 428 U.S. 132, 151 (1976).

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6. Three additional states have recently concluded that the determination of whether an appeal would have been successful is a question of law. *See Sturgis v. Skokos*, 335 Ark 41, 51, 977 S.W.2d 217, 222 (Ark. 1998) (matter of proximate cause for failure to file an appeal is a question of law to be decided by a judge); *Envtl. Control Sys., Inc. v. Andrews*, 301 Ill. App. 3d 612, 621, 703 N.E.2d 1001, 1008 (Ill. App. Ct. 1998) (the issue of proximate cause in an appellate legal malpractice case should be decided as a matter of law); *accord Dan Nelson Constr. Co. v. Nodland & Dickson*, 2000 N.D. 61, 608 N.W.2d 267 (N.D. 2000).

It is an inescapable conclusion that the Court of Appeals for the Second Circuit did not abuse its discretion in declining to certify the question of state common law presented in *Tinelli v. Redl* and Petitioner has not presented any valid reason for this Court to undertake review of the Second Circuit's decision.

B. By declining to certify an unresolved question of state common law to the highest court of the state, the Court of Appeals for the Second Circuit acted consistently with the precedents set out by this Court and created no conflict with the decisions of other Circuit Courts concerning the applicable principles for determining the propriety of certifying such questions.

As set out above, the Second Circuit acted in accordance with the principles articulated by this Court in deciding an unresolved question of state common law which did not present complex issues and for which there was uniform precedent both in New York and in the decisions of sister states. Accordingly, Petitioner has not demonstrated any conflict concerning the Second Circuit's declination to certify the underlying state law question to the highest state court and the decisions of this Court and the other Circuit Courts.

Petitioner claims that the Second Circuit's decision creates a conflict "with regard to its approach to resolving the issue of causation as a matter of fact or law." (Petition at 8). However, the resolution of the issue of causation, to the extent presented in the context of a state tort action, is a matter to be governed by the substantive law of the state and is an issue about which there may well be conflicts among the states.

> There is no general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). "Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local remedies diverging from those of its neighbors." *Klaxon C. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

Petitioner relies on two cases as evidencing this purported conflict. First, Petitioner cites *Henry v. Merck & Co.*, 877 F.2d 1489 (10th Cir. 1989) for the proposition that causation can become a question of law when there is no evidence from which a jury could find a causal nexus between the careless act and the injury. (Petition at 7). In *Henry*, the Tenth Circuit applied Oklahoma's negligence law to determine the liability of a chemical maker, who carelessly stored acid, for injuries sustained as a result of an intervening theft of the acid and its intentional misuse by the thief causing injury to a third party. Recognizing that Oklahoma had not addressed these precise factual circumstance, the Tenth Circuit analyzed the relevant case law of Oklahoma and concluded that "Oklahoma's application of the supervening cause doctrine would follow the analysis of the Nebraska Supreme Court." *Id.* 877 F.2d at 496. The Tenth Circuit looked to the existing law of Oklahoma and then looked to relevant precedent in other jurisdictions as did the Second

Circuit in *Tinelli v. Redl*. Petitioner has simply failed to show a conflict between the Second Circuit and the Tenth Circuit.

Petitioner then cites to *Peckham v. Continental Casualty Ins Co.*, 895 F.2d 830 (1st Cir. 1990) as supporting the existence of this purported conflict between the Circuits. (Petition at 7). The *Peckham* case simply discusses circumstances in which causation can be determined as a matter of law and in no way supports Petitioner's attempt to create a conflict between the Circuit Courts warranting review by this Court.

Petitioner argues that there is a "failure of circuit courts to engage in a uniform approach to addressing issues of substantive law when no controlling state precedent exists." (Petition at 9-10). Unfortunately, petitioner fails to show how the Second Circuit deviated from the principles articulated by this Court or how the Second Circuit's actions created a conflict with any other Circuit Court.

Petitioner's assertion that the Second Circuit's decision in *Tinelli v. Redl* creates a conflict with the First Circuit and the Tenth Circuit is nothing more than an assertion completely unsupported by the facts and cases relied upon by Petitioner. Accordingly, Petitioner's misleading characterization of a purported conflict provides no basis for this Court's review.

CONCLUSION

Petitioner raises no new or important questions. The Second Circuit determined that the issue presented in *Tinelli v. Redl* was neither unprecedented or complex and correctly decided the issue relying on lower court decisions and the uniform decisions of all other states that had previously considered the precise issue raised. There is simply no issue that must be resolved by this Court.

Wherefore, for the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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